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"Fair Compensation" in the Digital Age: Realigning the Audio Home Recording Act

Monica Zhang

"Fair Compensation" in the Digital Age: Realigning the Audio Home Recording Act

by MONICA ZHANG*

Whenever a copyright law is to be made or altered,
then the idiots assemble.
–Mark Twain[1]

I. Introduction

"Freemium"[2] web-based music streaming platforms such as Pandora and Spotify have become staples to music listeners, providing free and

* J.D. Candidate 2016, University of California, Hastings College of the Law. I am grateful for the invaluable insight and comments of Professor Ben Depoorter, and the unwavering support of my partner, Gabriel, and my mother. This note is for them.

1. MARK TWAIN, NOTEBOOK 382 (1935).

2. "Freemium" is term describing a business model that allows content providers to price discriminate by offering two versions of their service: free to users (but usually with bandwidth

legal content to users. It remains an open question, however, whether this will hurt or help digital revenue.[3] To put things into perspective, the first half of 2015 saw over one trillion streams worldwide—the highest yet.[4] But while these new streaming services appear to have shifted consumers from pirate services to legally licensed and paid services through growth in user base,[5] neither Pandora nor Spotify have become profitable businesses.[6] Even where the recorded music industry is suffering losses in sales, both digital and physical,[7] expansion of the royalty bearing pool for the Alliance of Artists and Recording Companies ("AARC") can be a source of significant increased revenues. This is not to suggest that the Audio Home Recording Act is a solution to online piracy, but a tool to shift the direct costs of piracy on the U.S. music industry[8] to consumers and the consumer electronic industry that directly and indirectly benefit from piracy.

limitations, more advertisements, fewer products, or some combination of the three) and premium for a fee. John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1409, 1439 (2013).

3. Victor Luckerson, *Spotify and YouTube Are Just Killing Digital Music Sales*, TIME (Jan. 3, 2014), http://business.time.com/2014/01/03/spotify-and-youtube-are-just-killing-digital-music-sales/ (pointing out that the swift rise of streaming while digital revenue continued to slip does not clarify whether this shift will help or hurt the music industry in the long run).

4. This number is aggregated across YouTube, Vevo (not counting overlap with YouTube), Vimeo, Spotify, Rdio, SoundCloud, and Pandora. *Data to Date: The Rapid Rise of Social and Streaming*, NEXT BIG SOUND, https://www.nextbigsound.com/industryreport/2015 summer (last visited Sept. 14, 2015).

5. "The subscription model is leading to more payment for music by consumers, many of whom appear to be shifting from pirate services to a licensed music environment that pays artists and rights holders." *See Facts and Stats*, IFPI.ORG, http://www.ifpi.org/facts-and-stats.php (last visited Mar. 5, 2015). Most notably, paid subscribers to subscriptions services rose to 28 million in 2013 globally. *See id.*; *see also* Lars Brandle, *Streaming Services Make Inroads Into Piracy Down Under, Spotify's Will Page Tells Bigsound*, BILLBOARD (Sept. 10, 2014, 4:31 AM), http://www.billboard.com/biz/articles/news/6244180/streaming-services-make-inroads-into-piracy-down-under-spotifys-will-page (reporting that piracy volume and population are trending downwards in Australia after Spotify's introduction of their service there).

6. The royalties doom services that base their business on mechanical licensing, leading to the conclusion that they are intrinsically unprofitable. *See* Stuart Dredge, *Spotify, Pandora and the Profits Problem for Streaming Music*, THE GUARDIAN (Aug. 1, 2013, 12:45 PM), http://www.theguardian.com/technology/2013/aug/01/spotify-pandora-streaming-music-profits; Lucas Mearian, *Music Industry Sucks Life from Subscription Services*, COMPUTER WORLD (Feb. 14, 2014, 3:33 PM), http://www.computerworld.com/article/2487757/e-commerce/music-industry-sucks-life-from-subscription-services.html; *see also* Joshua Brustein, *Spotify Hits 10 Million Paid Users. Now Can It Make Money?*, BLOOMBERG BUS. (May 21, 2014), http://www.bloomberg.com/bw/articles/2014-05-21/why-spotify-and-the-streaming-music-industry-cant-make-money; Paul Bonanos, *Pandora Beats Revenue Expectations, But Falls Short of Profits*, BILLBOARD (July 24, 2014, 7:00 PM), http://www.billboard.com/biz/articles/news/digital-and-mobile/6186144/pandora-beats-revenue-expectations-but-falls-short-of.

7. A 2004 study estimated that 20% of U.S. downloaded songs would be purchased legally. Martin Pietz & Patrick Waelbroeck, *The Effect of Internet Piracy on Music Sales: Cross-Section Evidence*, 1 REV. ECON. RES. ON COPYRIGHT ISSUES 71, 78 (2004).

8. A 2007 study estimated that the U.S. sound recording industry's direct global losses due to piracy were $5.33 billion. Steven E. Siwek, *The True Cost of Sound Recording Piracy to the*

The music industry is fending off attacks from all sides with the myriad of creative and free ways to infringe in 2015,[9] from streaming to peer-to-peer ("p2p") piracy to the rise of YouTube.[10] The time for comprehensive copyright reform is ripe.[11] In February 2015, the Copyright Office released a report highlighting the need for significant licensing reform, adducing that existing copyright schemes are no longer practical.[12]

At the time of its passage, the Audio Home Recording Act of 1992 ("AHRA" or "the Act") was seen as a reasonable compromise between the Recording Industry Association of America ("RIAA"), the consumer electronics industry, and consumers.[13] It was intended to provide proper compensation to copyright owners by mandating royalties for certain technologies to compensate copyright owners for losses from home taping, while simultaneously shielding manufacturers and consumers from infringement liability.[14] With the explosive adoption of digitalization and Internet usage,[15] consumption of music is now inextricably intertwined with digital media.[16] However, the AHRA has not been able to keep up

U.S. Economy, INST. FOR POLICY INNOVATION 12, 14 (Aug. 2007), http://www.ipi.org/docLib/20120515_SoundRecordingPiracy.pdf. Losses to U.S. retail industries that sell or rent sound recoding products were estimated to total $1.04 billion. *Id.* Total direct losses to all U.S. industries due to music piracy were estimated to exceed $6.37 billion. *Id.*

9. NDP, a market reporting service used by RIAA, reported that in 2009, only 37% of music acquired in the U.S. was paid for. *Scope of the Problem*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem (last visited Mar. 5, 2015).

10. One can easily rip mp3s directly from YouTube for download. *See Don't Just Watch . . . ListenToYoutube.com*, http://www.listentoyoutube.com/ (last visited Mar. 6, 2015).

11. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).

12. *See generally* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (2015), http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

13. "The purpose of [the AHRA] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use." S. REP. NO. 102-294, at 30 (1992), 1992 WL 133198. It also provided for a royalty collection scheme and required a serial copy management system that would "prohibit the serial copying of copyrighted music." *Id.*

14. *Id.*

15. According to The World Bank, only 1.7% of the United States population used the Internet in 1992, compared with 84.2% in 2014. *World Development Indicators*, THE WORLD BANK, http://www.data.worldbank.org/country/united-states (last visited Oct. 25, 2015). At the time of passage, Congress did not foresee the ascendancy of the Internet. *Id.*

16. A national survey of 2,002 randomly selected Americans age 12 or older found that more than 71% owned a smartphone, 54% identified the Internet as the most essential medium (over television, radio, and newspaper), 44% used the Internet the most to learn about new music, and Pandora was surveyed as the leading Internet-only audio service. *See The Infinite Dial 2015*, EDISON RESEARCH (Mar. 4, 2015), http://www.edisonresearch.com/wp-content/uploads/2015/03/InfiniteDial2015.pdf; *see also Internet Radio Passes Major Milestone as More than Half of Americans Are Now Monthly Users*, BUS. WIRE (Mar. 4, 2015), http://www.businesswire.com/news/home/20150304006259/en/Internet-Radio-Passes-Major-Milestone-Americans-Monthly#.VPlHZ1PF-iZ.

with the rapid pace of technological advancement due to Congress' passage of narrow statutory language;[17] proving that Congress's view was shortsighted by a general consensus that the AHRA is irrelevant despite of its well-intentioned bargain.[18] A robust copyright regime can only be as effective as it is adaptable to the unpredictable technological environment in which it exists because copyright is a reactive body of law.[19]

The AHRA has spawned little litigation. The AARC filed two consolidated class actions against major car companies (Ford, General Motors,[20] Chrysler, and Mitsubishi), and against technology companies (Denso and Clarion[21]) claiming entitlements to unpaid royalties due under the AHRA.[22] Denso and Clarion manufacture in-vehicle media copying devices, preinstalled in Ford, GM, Chrysler, and Mitsubishi cars. The devices allow users to store a compact disc's ("CD") audio contents onto a hard drive so that they are available for playback later.[23]

The AARC's lawsuit is premised on the argument that a company cannot escape liability by claiming multifunctionality in light of technological advances. Indeed, the "primary purpose" test applied by the Ninth Circuit drove a stake in the AHRA's heart. The defendants maintain that they are exempt from the AHRA's royalty requirement because their music hard drives are multipurpose. Nonetheless, the Federal District Court of Washington, D.C. may find that Ford and similar car manufacturers' use of copying devices and marketing the ability to copy music directly into the car's hard drive means that the devices' "primary

17. "When one reflects that the 'need' for [arbitrary specifications] was in fact nonexistent, it is an occasion for some sadness in the annals of sensible lawmaking." DAVID NIMMER, COPYRIGHT ILLUMINATED: REFOCUSING THE DIFFUSE U.S. STATUTE 103 (2008).

18. *Id.*

19. *See* Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1847 (2009) (observing that legal uncertainty pervades all areas of the law, but especially so in copyright where there is constant need to respond to issues raised by unpredictable technological advances).

20. *See* Complaint at 1, Alliance of Artists and Recording Cos. v. Gen. Motors Co., No. 14-cv-1271 (D.D.C. July 25, 2014), 2014 WL 3735190; *see also* Andrew Flanagan, *Ford, General Motors Sued for Unpaid Royalties*, BILLBOARD (July 28, 2014), http://www.billboard.com/biz/articles/news/digital-and-mobile/6190833/ford-general-motors-sued-for-unpaid-royalties.

21. *Judge Orders Consolidation of 2 AHRA Suits Against Automakers*, CONSUMER ELEC. DAILY (Feb. 13, 2015), https://advance.lexis.com/document/?pdmfid=1000516&crid=a4754b31-e143-478f-bdb0-e7a26c97b467&pdworkfolderid=309f45a5-f29e-4f93-b2b6-6ede39a14e4c&ecomp=st2g&earg=309f45a5-f29e-4f93-b2b6-6ede39a14e4c&prid=984d015b-d2a0-44c6-b2f2-88f4cc6e845c.

22. *See* Complaint at 1, Alliance of Artists and Recording Cos. v. Chrysler Grp., No. 14-cv-1920 (D.D.C. Nov. 14, 2014); *see also* Richard Smirke, *Music Industry Sues Chrysler, Mitsubishi Over In-Car Recording Devices*, BILLBOARD (Dec. 3, 2014), http://www.billboard.com/articles/business/6334855/aarc-sues-chrysler-mitsubishi-private-copying-leavies.

23. Flanagan, *supra* note 20.

purpose" *is* to make digital audio copied recordings.[24] In 1992, who could have predicted that today there would be touch-screen phones capable of instantaneous internet connection that enables consumers to live stream a video in high definition or that in the near future that Wi-Fi would be available not only on planes, but in cars?[25] Regardless of the outcome, the current lawsuit highlights the need to contextualize copyright law with the realities of the digital age, the speed of emerging consumer technological advances, and the market for these new technologies.

This note's interest in the Act lies in the speed and unpredictability of human innovation and consumer behavior.[26] Today, computers and the Internet play a major role in the recording, distribution, and playback of music.[27] At the same time, the Internet has continually enabled people to use its power for infringement.[28] Since Napster's introduction of "p2p" file-sharing in 1999, music sales have dropped 53% from $14.6 billion to $7 billion in 2013.[29] Global music piracy has been estimated to contribute $12.5 billion in economic losses annually to the United States' economy.[30]

New trends in music consumption demonstrate unpredictability due to the speed of technological and digital innovation and the ease of copyright infringement in the digital age. But even then, personal preferences and consumption are fickle, varied, and unpredictable. Take vinyl records, for example, which grew 52% over the course of 2013-2014 and the 9.2

24. The drafters intended "primary purpose" to mean "a purpose that exceeds 50 percent of all purposes." S. REP. NO. 102-294, at 47 (1992), 1992 WL 133198.

25. In January 2015, Verizon Communications, a U.S. telecommunications company, announced the Verizon Vehicle, a proposed car accessory and service for $14.99 per month that "will empower the millions of drivers who have been locked out of the digital experience" through a car's diagnostic port. Ina Fried, *Verizon Aims to Connect Older Cars with $15-a-Month Service*, RE/CODE (Jan. 13, 2015, 10:20 AM), http://recode.net/2015/01/13/verizon-aims-to-connect-older-cars-with-new-service/. The service will offer features ranging from parking spot tracking to car diagnostics help to roadside assistance. *Id.* The service is targeted at the entire market, offered the same price for Verizon and non-Verizon phone customers alike, with a hint to consumers to "[s]tay tuned" for in-car Wi-Fi. *Id.*

26. *See* Sofia Ritala, Note, *Pandora & Spotify: Legal Issues and Licensing Requirements for Interactive and Non-Interactive Internet Radio Broadcasters*, 54 IDEA 23 (2013) (comparing business models of music streaming platforms); Skylar Bergl, *The World's Top 10 Most Innovative Companies in Music*, FAST CO. (Apr. 7, 2014, 6:00 AM), http://www.fastcompany.com/3026681/most-innovative-companies-2014/the-worlds-top-10-most-innovative-companies-in-music.

27. AMNON LEHAVI, THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES 73 (2013).

28. *See, e.g.*, ENVISIONAL, TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET 3–5 (2011) (estimating that 17.53% of U.S. internet traffic was infringing, transfer of infringing content on p2p networks comprising 13.8% of all internet traffic, only one of BitTorrent's 10,000 most popular pieces of content noncopyrighted).

29. *Scope of the Problem*, RIAA, *supra* note 9.

30. Siwek, *supra* note 8.

million copies sold represented the highest number since Nielsen started tracking music sales in 1991.[31] This served as a reminder to everyone that the physical music format predecessor of the cassette tape, which itself is the predecessor of the DC, is not dead. It was only a matter of time before digital revenue surpassed physical revenue.[32] But even though digital revenue is becoming more complex, music downloads have dropped while streaming and vinyl grow.[33] CD sales fell 19.1% in the first half of 2014 with physical formats accounting for only 28% of music revenue, compared to digital's 68% (41% downloads plus 27% streaming).[34] The RIAA estimates that the U.S. music marketplace revenue is at $2.2 billion, down from $2.3 billion at mid-year in 2013.[35]

Fair compensation under the Copyright Act can, and was intended to, be addressed by the AHRA. Part II will explain the context in which the AHRA was passed and how it fits within the larger scheme of the Copyright Act. As the Supreme Court explained, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[36] This section will examine the AHRA's key definition of digital audio recording devices ("DARDs") and how it has been applied. It will also show how the narrow statutory language of the 1992 amendment is inconsistent with the rest of the Copyright Act.

Part III will elaborate on why the AHRA has been called "the worst thing that ha[s] ever happened to the Copyright Act."[37] It will measure the

31. Keith Caulfield, *Vinyl Album Sales Hit Historic High in 2014, Again*, BILLBOARD (Dec. 31, 2014, 6:25 PM), http://www.billboard.com/articles/columns/chart-beat/6422442/vinyl-album-sales-hit-historic-high-2014; Kelsey McKinney, *Vinyl Record Sales in 2014 Were the Highest They've Been Since 1993*, VOX (Jan 5. 2015, 12:40 PM), http://www.vox.com/2015/1/5/7494461/vinyl-record-sales-2014.

32. In 2011, digital music sales surpassed physical sales with an increase of 8.4%, climbing to 50.3% of all music purchases for the first time in history. Jasmine A. Braxton, Note, *Lost in Translation: The Obstacles of Streaming Digital Media and the Future of Transnational Licensing*, 36 HASTINGS COMM. & ENT. L.J. 193, 201 (2014); Sam Gustin, *Digital Music Sales Finally Surpassed Physical Sales in 2011*, TIME (Jan 6, 2012), http://business.time.com/2014/01/03/spotify-and-youtube-are-just-killing-digital-music-sales/.

33. Ethan Smith, *Music Downloads Plummet in U.S., but Sales of Vinyl Records and Streaming Surge*, WALL ST. J. (Jan. 1, 2015), http://www.wsj.com/articles/music-downloads-plummet-in-u-s-but-sales-of-vinyl-records-and-streaming-surge-1420092579?cb=logged0.5412101105321199.

34. Ed Christman, *U.S. Music Revenues Down Nearly 5%, Says RIAA*, BILLBOARD (Sept. 25, 2014; 4:59 PM), http://www.billboard.com/biz/articles/news/record-labels/6266341/us-music-revenues-down-nearly-5-says-riaa.

35. *Id.*

36. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

37. Nimmer, *supra* note 17, at 103.

success of the AHRA in numbers to show how it has failed, and thus demonstrates the need for legal intervention to ensure fair compensation in accordance with the quid pro quo of copyright law.

Part IV will compare the AHRA's royalty with similar levies in Europe and Canada (with a specific focus on Finland) and discuss Congress' intentions for copyright reform. Copyright protection is territorial, despite attempts at providing an international standard,[38] and incongruent policies create disincentives for artist creation in countries where their works are not properly compensated. Finally, this note will present a proposal to amend the AHRA to better suit the realities of the digital age by widening the royalty-bearing base. As Congress is currently examining the Copyright Act in order to introduce changes, it is time to amend the AHRA's narrow language to reconcile the statute's intended purpose with the realities of its implementation.[39]

This note will conclude by suggesting two steps on how to realign the AHRA with its statutory intent, which was based on comparative international examples, while allowing the United States to meet its international obligations. The first step involves shifting the underlying assumptions to a more realistic expectation of how music is consumed, copied, and transferred like in Europe. The second step is to amend and broaden the definitions of DARD's, like in Canada, or to create a compensation fund provided directly by the state, as in Finland.

II. Why the AHRA: Technological Innovation, Mass Infringement, and the Copyright Act

Congress' power to grant limited monopolies is rooted in the Copyright Clause,[40] and "involves a difficult balance between the interests of authors . . . in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our . . . copyright statutes have been amended repeatedly."[41] New technological innovations, from the printing press to audio recorders to the Internet, have historically been identified by copyright law as new tools for enabling

38. *See* Convention Establishing the World Intellectual Property Organization art. IV, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 [hereinafter WIPO].

39. *See* Pallante, *supra* note 11; *see also* U.S. COPYRIGHT OFFICE, *supra* note 12.

40. "The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

41. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

infringement.[42] A look back in time at various consumer technologies will best help to understand the climate in which the AHRA was passed and serve as a guide to the legislative intent behind it.

A. Videocassette Recorders and the Birth of the Home Taping Exception

In 1984, the Supreme Court ruled that "time-shifting"—consumers creating individual copies of complete television shows on videocassette recorders ("VCR") tapes to watch at a later date—was fair use, and thus shielded Sony and other VCR manufacturers from infringement liability.[43] The RIAA's goal in protecting the integrity of its members' copyrights directly conflicted with the consumer-electronics industry. By pushing the limits of fair use, Sony and its competitors sought to shield themselves and their customers from infringement liability in order to maximize the potential consumer electronics market. VCR's, an analog technology, were exempted from infringement liability under the fair use doctrine, narrowly allowing home taping for "time-shifting" purposes.[44] With the birth of the home taping exception expanded by the AHRA and cemented by the Ninth Circuit in *RIAA v. Diamond*, consumers gained a shield against copyright infringement.[45]

B. The Digital Era and Serial Copying

By 1986, however, the digital age had come to stay with the introduction of the first digital audio tape ("DAT"), which enabled consumers to make quality home copies of prerecorded music.[46] DAT technology would not only enable consumers to make copies of original works purchased commercially, but also copies of copies without decreasing quality.[47] As audio recording technology became increasingly refined, copyright infringement through digital copying no longer suffered in quality.[48] This was alarming because analog recordings, by contrast,

42. RICHARD RAYSMAN ET AL., EMERGING TECHNOLOGIES & THE LAW: FORMS AND ANALYSIS § 5.24 (2014).

43. *See Sony*, 464 U.S. at 429.

44. Home "time-shifting"—the private noncommercial practice of recording a program at home for later viewing and erasing it afterwards—was found to be fair use. *Id.* at 423, 455.

45. 180 F.3d 1072 (9th Cir. 1999).

46. H.R. REP. NO. 102-873, pt. 2, at 2 (1992).

47. *Id.*

48. Richard S. Ginell, *Got Dat? Digital Audio Tape Is Coming Soon*, CHI. TRIBUNE (Dec. 4, 1986), http://articles.chicagotribune.com/1986-12-04/features/8603310860_1_dat-conventional-cassettes-digital-audio-tape.

suffered progressive degradation in sound quality when copied.[49] The recorded music industry's monopoly on manufacturing quality sound recordings had ended, which was hugely concerning to the industry.

In 1990, Academy Award-winning songwriter Sammy Cahn and four music publishers filed class actions against Sony for contributory infringement in an attempt to block their importation of DATs into the United States.[50] Serial copying, later defined as the "duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording,"[51] was Cahn's major concern because it was enabled by the lack of degradation between subsequent copies.[52] The suit was settled in 1991 as part of a larger compromise between the recording industry and the consumer electronics industry wherein the latter would establish implementation of a serial copying management system.[53] Sony and Philips, who sought to bring their DATs to U.S. consumers (Minidiscs and Digital Compact Cassettes, respectively) bowed to the RIAA's threats of a lawsuit and DATs never became the digital recording medium of choice for consumers.[54] This compromise would ultimately become codified as the AHRA.[55]

49. Benton J. Gaffney, *Copyright Statutes that Regulate Technology: A Comparative Analysis of the Audio Home Recording Act and the Digital Millennium Copyright Act*, 75 WASH. L. REV. 611, 616 (2000).

50. Complaint at 1, Cahn v. Sony Corp., No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991). The suit was filed "on behalf of all owners of copyrights in musical compositions, and all transferees of the exclusive rights to authorize the making of sound recordings and the distribution of phonorecords, who are entitled to receive mechanical royalties from record companies licensed by The Harry Fox Agency, Inc." *Id.* ¶ 10.

51. 17 U.S.C. § 1001 (2014).

52. Analog copying required a physical process of playing the original recording while the phonograph's stylus's mechanical movements are transmitted into an electrical signal that is later amplified. Analog's dependency on physical process allowed distortion and interference in the quality of sound, resulting in sound degradation between subsequent copies from the original. Digital copying, however, converts sound into a mathematical series of 1s and 0s, which is then reassembled without any deviation from the original, resulting in perfect copies. N. Jansen Calamita, Note, *Coming to Terms with the Celestial Jukebox: Keeping the Sound Recording Copyright Viable in the Digital Age*, 74 B.U. L. REV. 505, 515–16 (1994).

53. Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A. 497, 501 (1998).

54. After years of legal and legislative holdbacks keeping DAT products from market, consumer interest waned and the market for DATs never developed. KEVIN PARKS, MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX 162 (2012).

55. Kurlantzik & Pennino, *supra* note 53; S. REP. NO. 102-294, at 33 (1992), 1992 WL 133198.

C. The AHRA: A (Not-So) Great Compromise

Congress passed the AHRA to resolve debates over distribution of technologies,[56] enabling home taping of copyrighted works between device manufacturers and the music industry that had spanned two decades.[57] After *Sony*'s home taping exception, the AHRA expanded the exception to digital copying, and effectively legalized home taping for noncommercial private use under the condition that such devices were manufactured with a serial copying management system and paid a royalty.[58] However, unlike traditional copyright law, which granted clear rights and remedies to authors, the AHRA replaced the black and white infringement (and contributory infringement) system with a serial copy protection and blanket royalty payments on qualifying equipment, defined with specificity.[59]

The legislative history of the Act reveals it was a "direct response to the needs of the music industry, the consumer electronics industry, and consumers."[60] Congress's primary intent in passing the AHRA was to "[e]nsure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."[61] To balance this, the Act also implemented a "royalty payment system that provides modest compensation to the various elements of the music industry for the digital home recordings of copyrighted music."[62] In addition, it mandated a "serial copy management system that would prohibit the digital serial copying of copyrighted music."[63]

The AHRA shielded consumers from infringement actions for private noncommercial copying,[64] premising the collection of the royalty on qualifying "digital audio recording devices"[65] and "digital audio recording

56. H.R. REP. NO. 102-873, pt. 1, at 9 (1992).

57. RAYSMAN ET AL., *supra* note 42.

58. The royalty was set at two percent of the transfer price for DARDs and three percent for DARMs distributed in the U.S., both imported and manufactured, with slightly different calculations of the royalty-bearing base depending on if the device was sold in combination. *See* Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 2 106 Stat. 4237, 4241–42 (1992) (codified as amended at 17 U.S.C. § 1003 (2013)).

59. Brendan M. Schulman, Note, *The Song Heard 'Round the World: The Copyright Implications of MP3s and the Future of Digital Music*, 12 HARV. J.L. & TECH. 589, 607–08 (1999).

60. S. REP. NO. 102-294, at 33 (1992), 1992 WL 133198.

61. *Id.* at 51.

62. *Id.* at 30.

63. *Id.*

64. "No action may be brought under this title . . . based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings." 17 U.S.C. § 1008.

65. Digital audio recording devices are defined as:

media"[66] used to copy "digital musical recording[s]."[67] The statute included a specific exemption for computers.[68] In return, featured artists and copyright owners who registered for membership with the AARC were entitled to yearly distribution of royalties collected.[69]

The AHRA seemed progressive on its face because it served the public interest by protecting private access, while attempting to somewhat compensate the music industry for the direct loss in profits brought on by the emergence of digital copying technologies available to consumers.[70] However, practical application is another matter. For example, digital audio recording mediums ("DARMs") conditioned the three percent transfer price royalty on whether it was "primarily marketed" for making digital audio copied recordings with DARDs. This means that the United States does not collect royalties on blank CDs or DVDs, but only on blank CDs that are labeled and sold for music use. Similarly, the United States does not collect on CD burners in computers, but only on stand-alone CD

> [A]ny machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for— (A) professional model products, and (B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

17 U.S.C. § 1001 (2013).

66. Digital audio recording media is defined as:

> [A]ny material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device. (B) Such term does not include any material object— (i) that embodies a sound recording at the time it is first distributed by the importer or manufacturer; or (ii) that is primarily marketed and most commonly used by consumers either for the purpose of making copies of motion pictures or other audiovisual works or for the purpose of making copies of nonmusical literary works, including computer programs or data bases.

Id.

67. Digital musical recording is defined as:

> [A] material object—(i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Id.

68. "A 'digital musical recording' does not include a material object . . . in which one or more computer programs are fixed[.]" *Id.*

69. ALLIANCE OF ARTISTS AND RECORDING COS., http://wp.aarcroyalties.com/ahra (last visited Mar. 28, 2015).

70. LUCAS HILDERBRAND, INHERENT VICE 102 (2009).

burners. Realistically speaking, the vast majority of consumers buy blank CDs for burning music.[71] Manufacturers of computers, smart phones, tablets, and blank discs do not have an incentive to make and market their products as single-use for the simple fact that it is not a competitive move. Doing so would subject its products (and ultimately consumers) to the copying of royalty fees and lessen the products' appeal when compared to multifunctional products that encompass its own features—bundling features would bolster its competitive appeal to consumers *and* escape the tax.

D. Computer Exemption Leaves Gaping Hole

The history of consumer technology shows that the invention, development, and adoption of new technologies are premature by years or off the mark entirely.[72] As a responsive body of law, the Copyright Act's attempts to craft forward-looking and flexible laws do not always match its predictive goals.[73] "New uses should not necessarily result in the weakening of a previously broad protection of ownership,"[74] but because the AHRA was a targeted response to DATs, it did not share the same flexible, future-proof definitions as the rest of the Copyright Act.[75]

David Nimmer, renowned expert in copyright law, expressed his dismay that the pro-music intent underlying the 1992 amendment turned Title 17 into a "hopeless mishmash"[76] and a "forbidding jungle of arbitrary specifications."[77] In 1992, Congress passed the AHRA on the assumption that DATs were set to become the next big thing, the future of digital music.[78] Personal computers, by comparison, were used for "a variety of financial and technical applications having nothing to do with music."[79] By

71. Tim Armstrong, *What Are Canadian Consumers Getting for Their Blank Fees?*, INFO/LAW (Sept. 5, 2006), https://blogs.law.harvard.edu/infolaw/2006/09/05/what-are-canadian-consumers-getting-for-their-blank-cd-r-fees/

72. Depoorter, *supra* note 19, at 1840 (pointing out famous examples such as the creation of Xerox after leaving Kodak when the copying process idea was dismissed, and IBM's dismissal of the notion of a market for home computers).

73. HILDERBRAND, *supra* note 70, at 101–03.

74. LEHAVI, *supra* note 27.

75. *Compare* 17 U.S.C. § 101 (containing broad and vague definitions such as "[a] 'device', 'machine', or 'process' is one now known or later developed") *and* 17 U.S.C § 1001 (containing fact-specific definitions such as "'digital audio recording medium'' as any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device").

76. NIMMER, *supra* note 17, at 103.

77. *Id.*

78. *Id.* at 104.

79. *Id.* at 105.

adhering to a premature opinion about technology, any hopes for just compensation under the AHRA died with the DAT.[80] The AHRA "devolved into an anti-music industry defense"—a "failure compounded upon failure."[81]

The Ninth Circuit in *RIAA v. Diamond*—the first and only litigated case arising under the AHRA[82]—significantly diminished the scope of the AHRA by categorically exempting copies made through an intermediary computer. There, the RIAA and AARC brought a lawsuit against Diamond Multimedia Systems for its Rio portable MP3 player, alleging it was a DARD that did not have a serial copying management system and did not pay royalties as required by the AHRA.[83] The Rio included software that allowed users to rip music from a CD, convert it to MP3 format for storage on a computer's hard drive, and then transfer the MP3 from the hard drive to the player itself.[84] In order for the Rio to fall within the definition of a DARD, it had to be able to reproduce a digital music recording "'directly' or 'from a transmission.'"[85] Computers and their hard drives did not fall within the AHRA's definition of DARDs under a plain meaning interpretation "because their 'primary purpose' [was] not to make digital audio copied recordings."[86] The Ninth Circuit thus held that, "[b]ecause the Rio cannot make copies from transmissions, but instead, can only make copies from a computer hard drive, it is not a [DARD]."[87] This huge exemption effectively eviscerated the AHRA because "any recording device could evade AHRA regulation simply by passing the music through a computer."[88] But, while the Ninth Circuit acknowledged this gaping loophole, it deferred to Congress's expressly designed intent in applying a "primary purpose" requirement to devices, leading to the unfortunate conclusion that "computers are *not* digital audio recording devices."[89]

Applying *RIAA v. Diamond* to the current AARC litigation certainly favors the auto manufacturers' arguments because hard drives are indeed multi-purpose beyond mp3 copying. However, this fact only strengthens

80. *Id.*

81. *Id.* at 106.

82. *Id.* at 105.

83. RIAA v. Diamond Multimedia Sys., 180 F.3d 1072, 1075 (9th Cir. 1999).

84. David Balaban, Note, *The Battle of the Music Industry: The Distribution of Audio and Video Works Via the Internet, Music and More*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235, 265 (2001) (citing RIAA v. Diamond Multimedia Sys. (*RIAA I*), 29 F. Supp. 2d 624, 625 (C.D. Cal. 1998))

85. *RIAA*, 180 F.3d at 1077.

86. *Id.* at 1078.

87. *Id.* at 1081.

88. *RIAA I*, at 630.

89. *RIAA*, 180 F.3d at 1078.

why the AHRA is obsolete and in sore need of a facelift. A consumer electronics manufacturer can bypass the AHRA by simply bundling functionalities because making a particular technology or medium multi-purpose exempts the manufacturer from the AHRA.[90] But, the consumer technology industry already has an incentive to bundle features due to the nature of competitive markets and consumer expectations of convenience and multifunctionality. There is no need for Congress to create an incentive, let alone at the direct cost of the content creators that fill iPods and hard drives. Manufacturers of blank CDs or other storage mediums draw much of their market share from consumer expectation, intention, and anticipated ability to use such products to make copies of copyright works.

III. Measuring the AHRA's "Success" and How Narrow Statutory Language Doomed It from the Start

The AARC was formed as a nonprofit entity to collect and distribute royalties generated by the AHRA from qualifying consumer products that allowed users to make noncommercial copies of copyrighted works.[91] The AARC distributed $100,000 in royalties to 1120 members in its first year[92] and almost $5.5 million to 200,000 members in 2012, its twentieth year.[93] Today, the AARC boasts a membership of over 500,000 artists and record labels worldwide.[94] $5.5 million in royalties in a single year may seem like a lot, but it is pitifully meager within the context of the recording industry's $5.9 billion in digital revenue worldwide.[95] The AARC's effectiveness in collecting and distributing royalties declined sharply in the past three years, but not for lack of devices being imported, manufactured, and sold in the United States with copying capabilities.[96] The U.S. Copyright Office issued a rule that will allow copyright owners to audit statements of accounts and royalty fees that are collected on their behalf. However, those looking for lost royalties owed to them by the AARC likely will not find much.[97] They would be better served looking to the main source for this lack of income—the AHRA itself.

90. *Id.* at 1072.

91. AHRA is a nonprofit similar to BMI and ASCAP. *See* ALLIANCE OF ARTISTS AND RECORDING COMPANIES, *supra* note 69.

92. Linda R. Bocchi, *A Letter from AARC's Executive Director* (May 20, 2013), http://wp.aarcroyalties.com/2013/05/20/a-letter-from-aarcs-executive-director/.

93. *Id.*

94. *See* ALLIANCE OF ARTISTS AND RECORDING COMPANIES, *supra* note 69.

95. *See Facts and Stats*, *supra* note 5.

96. Even in its best year (2000), the AARC's only collected $5,280,536.64. *See* Bocchi, *supra* note 92.

97. NewsNet, *Office Issues Final Rule on Auditing Statements of Account and Royalty Fees*, COPYRIGHT.GOV (Nov. 18, 2014), http://copyright.gov/newsnet/2014/562.html.

The unpredictability of music consumption trends, along with the revenue streams that follow, make it especially difficult for musicians to predict or invest in their creative output. Musicians are deeply affected by mass infringement and piracy and struggle to make up the revenue elsewhere. Taylor Swift, the top-selling artist of 2014, opined:

> There are many *(many)* people who predict the downfall of music sales and the irrelevancy of the album as an economic entity. I am not one of them. In my opinion, the value of an album is, and will continue to be, based on the amount of heart and soul an artist has bled into a body of work, and the financial value that artists (and their labels) place on their music when it goes out into the marketplace. Piracy, file sharing and streaming have shrunk the numbers of paid album sales drastically, and every artist has handled this blow differently.[98]

As discussed, the AHRA's reputation as a dead letter law doomed to obsolescence is because it was far too technologically specific—defining DARDs and DARMs too narrowly while granting specific exemptions to computer hard drives. In order to inject relevance back into this section of the Copyright Act, "Congress needs to see the evolution of technology and related businesses with some objectivity and to consider, as appropriate, the rulings and the frustrations of the courts before it can move forward."[99]

IV. No Need to Reinvent the Wheel: Looking Abroad for Answers

Copyright infringement of music can be achieved with the click of a button and by easily accessible technologies—it need not and does not wait for specific technology designed for infringement. Infringement will happen if there is capable technology. "Whenever technological advances create new means of making copies or communicating copyrighted works, difficult questions arise as to how boundaries should be drawn around new uses of content created by the new technology."[100] This is a fact that has concerned copyright protectionists the world over.

98. Taylor Swift, Op-Ed., *For Taylor Swift, the Future of Music Is a Love Story*, WALL ST. J. (July 7, 2014), http://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219.

99. Pallante, *supra* note 11, at 344.

100. Depoorter, *supra* note 19, at 1835.

A. The European Example

The European Union ("E.U.") version of the AHRA, the Information Society Directive ("Directive"), also mandates a levy on manufacturers and imports of digital audio recording devices and mediums if member states decide to allow for a private copying exemption.[101] The Directive goes well beyond the international obligations of the Berne Convention[102] and WIPO.[103] The Directive's Recital 11 of The Preamble states that its levy regime is "a rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers."[104] The Directive harmonized national laws among E.U. Member States, but, for the comparable portions regarding fair use rights, only set out basic statutory minimums and options for Member States to adopt. Any private copying exemption would require a compensation scheme.[105] The Directive's vague harmonization intent has allowed for a varied application of private copying levying schemes from country to country. This allows for an opportunity to examine how different Member States are ensuring fair compensation for private copying.

The European Court of Justice has reasoned that private copying has undoubtedly caused harm to rightsholders and that private users should remedy the harm caused.[106] The E.U. levies were justified by the presumption that manufacturers would pass the costs to consumers who would be making private copies.[107] Due to the practical impossibility of determining "whether the media are marketed to intermediaries, to natural or legal persons for use other than for private purposes or to natural persons

101. Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 [hereinafter "Information Society Directive"].

102. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as amended on Sept. 28, 1979, 828 U.N.T.S. 221, S. TREATY DOC. NO. 99-27 [hereinafter "Berne Convention"]. The Berne Convention, first ratified in 1886, was an international copyright convention whose signatories recognized international standards for protections of copyright and related rights for its signatories, including the U.S. *Id.*

103. WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 231, S. TREATY DOC. NO. 105-17 (1997) [hereinafter "WPPT"]. The WPPT, signed by the member states of WIPO, the U.N.'s intellectual property agency, was implemented in the U.S. as the Digital Millennium Copyright Act. *Id.*

104. Information Society Directive, *supra* note 101.

105. RAYSMAN ET AL., *supra* note 42, § 5.05.

106. Case C-467/08, Padawan SL v. Sociedad Gen. de Autores y Editores de España, 2010, E.C.R. I-10098, ¶ 44-45.

107. *Id.* ¶ 46-50.

for use for private purposes,"[108] the levy is based on the assumption that if recording media is capable of being used for reproduction, then the consumer benefits from the full use of the media.[109] This is a fundamental difference in the underlying assumptions between the United States' AHRA and the E.U.'s private copying levies. Because the E.U. assumes that any technology with the ability to be used for copying (whether infringing or not) will exploit that ability, it is not technology specific and embodies a realistic view of copyright infringement today despite the difficulties in tracking individual infringement.[110] This understanding about consumer behavior is an appropriate balance between unfettered technological advances and the acknowledgement of the value of artistic content.

B. Finland Taxed Memory Storage, Moving Towards More Compensation

In December 2014, the Finnish Parliament overwhelmingly voted to replace its levies system in favor of a government compensation fund to artists for private copying losses.[111] This new compensation system follows in the footsteps of Spain and has been described as "fairer to consumers and better for artists because they will get more compensation."[112] This is in stark contrast to the United Kingdom, a fellow E.U. member, which passed a law in 2014 that legalized individual private copying without a compensation requirement.[113] It is currently undergoing judicial review.[114] Prior to January 1, 2015, Finland's Teosto, their version

108. Case C-521/11, Amazon.com Int'l Sales, Inc. v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH, CURIA, ¶ 41 (July 11, 2013).

109. *Id.* ¶ 15.

110. "The devices' recording capabilities justify being charged with the private copying levy." Jaclyn Kavendek, Note, *The Positive and Negative Consequences of the European Union Court of Justice's Amazon Decision on International Private Copying and America*, 63 CATHOLIC U. L. REV. 789, 803 (2014).

111. Paul Meller, *Pressure for EU Copyright Levy Reform Grows: Finland Votes to Replace Levies With a Government Fund*, DIGITAL EUR. (Dec. 11, 2014), http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&entryID=867&PortalId=0&TabId=353.

112. *Id.* (quoting Finnish politician Henna Virkkunen).

113. *Id.*

114. The new law's lack of a compensation complement has been viewed as a grave error on the part of the U.K. government as a decision to not protect the country's creative industries. Tom Pakinkis, *Industry Files for Judicial Review Over Lack of Compensation in Private Copying Exception*, MUSIC WEEK (Nov. 27, 2014, 12:15 PM), http://www.musicweek.com/news/read/industry-files-for-judicial-review-over-lack-of-compensation-in-private-copying-exception/060222. UK Music chairman, Andy Heath, was quoted as saying, "the Private Copying legislation has ramifications, both national and international that puts all rights owners at risk. There has to be a point at which we say we believe in copyright and we will defend it against this or other government's efforts to devalue it." *Id.*

of the AARC, collected levies on imports of a wide range of consumer electronics including blank media and mp3 players based on memory storage.[115] Now, instead of consumers paying taxes under the earlier private levy regime, the government will have taxpayers fund artist compensation directly from the state's budget.[116] For the 2015-2016 year, the Finnish legislature has appropriated 11 million euros.[117] To put that number in perspective, Finland collected just under 5 million euros in copyright levies for 2014.[118] This means that total artist compensation payouts in 2015 will be 16 million euros. Finland's legislature has come to the conclusion that while a levy system is well intentioned, the scope of products that are subject to levy is too technology-specific and thus ill-suited to being future-proof.[119] Bypassing a pricing system that relies on technology-specific definitions also saves the government the headache of fitting a levy system into new copying devices such as memory sticks, TV digital adapters, and online cloud storage lockers.

C. The Canadians Are on the Right Track

Canada's New Democratic Party supported a similar five percent "iPod tax" on mp3 players in 2013 to bolster the funds to compensate artists for piracy losses.[120] However, overwhelming outrage from Canadian consumers and consumer electronics companies reversed the tax and companies were refunded almost $27 million.[121] To put things in perspective, Apple, the world's largest company with a valuation of $700 billion,[122] has sold more than 390 million iPods[123] and 700 million iPhones

115. Teosto taxed external hard drives, starting at 9 euros for 50-250 gigabytes ("GB") to 12 euros for 250 GB–1 terabyte ("TB") and 18 euros for 1 TB- 3 TB. YKSITYISEN KOPIOINNIN HYVITYSMAKSU, http://www.hyvitysmaksu.fi/fin/prices.html (last visited Mar. 28, 2015).

116. Jennifer Baker, *Finland Ditches Copyright Levy on Digital Kit, Pays Artists Directly*, THE REGISTER (Dec. 12, 2014, 11:42 AM), http://www.theregister.co.uk/2014/12/12/finland_ditches_copyright_levy_on_digital_devices/.

117. Veli Sinda, *Future Proof and Technology Neutral Legislation for Private Copying Levies*, TECH. INDUS. (Mar. 25, 2015), http://teknologiateollisuus.fi/en/ajankohtaista/teknoblogi/future-proof-and-technology-neutral-legislation-private-copying-levies.

118. *Id.*

119. *Id.*

120. Leslie MacKinnon, *Confusion Over 'iPod Tax' Deepens*, CBC NEWS (Jan. 21, 2014 5:19 PM), http://www.cbc.ca/news/politics/confusion-over-ipod-tax-deepens-1.2505522.

121. Mike Moffat, *Canada's iPod Tax is Dead,* CANADIAN BUS. (June 4, 2014), http://www.canadianbusiness.com/blogs-and-comment/canada-ipod-tax-is-dead/.

122. Tim Higgins, *Apple Continues to Climb After Market Value Tops $700 Billion*, BLOOMBERG BUS., http://www.bloomberg.com/news/articles/2015-02-10/apple-closes-at-record-market-value-of-more-than-700-billion.

123. Sam Costello, *Total Number of iPods Sold All-Time*, ABOUT, http://ipod.about.com/od/glossary/qt/number-of-ipods-sold.htm (last updated Oct. 13, 2015).

worldwide.[124] The success of these two Apple products, among a sea of competing products, derived their value as vehicles for musical content consumption.

The Copyright Board of Canada's Canadian Private Copying Collective ("CPCC") is the equivalent of the AARC.[125] The CPCC, established in 1999 after the addition of Part VIII to the Canadian Copyright Act,[126] collects the Private Copying Tariff placed on "blank audio recording mediums"[127] for the mainly economic purpose to compensate artists and copyright owners for their work.[128] The taxable base was to include all media where the ability to copy music was "non-negligible."[129] It is interesting to note that the CPCC's private copying tariff proposals are short term, effective for a year or more,[130] and are delineated by media type. Even more interesting is that the tariff on CD-R's was raised from twenty-one cents to twenty-nine cents in 2009 and the tariff on MiniDisc, a type of DAT, was eliminated in 2011 (from twenty-nine cents).[131] "Because technologies come and go and the value of private copying can change over time, the *Copyright Act* does not specify the types of media that the private copying levy applies to or the rates for each type of media."[132] Such a flexible private copying tax operating within an intentionally broad definition of a DARD has collected $293 million for distribution to date.[133]

124. Sam Costello, *How Many iPhones Have Been Sold Worldwide?*, ABOUT, http://ipod.about.com/od/glossary/f/how-many-iphones-sold.htm (last updated Mar. 9, 2015).

125. Jeremy deBeer, *Working Together in a Digital World: An Introduction: Article: Locks & Levies*, 84 DENVER U.L. REV. 143, 143 (2006).

126. *Id.*

127. Blank audio recording mediums are defined as "a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium." Copyright Act, R.S.C. 1985, c. C-42, § 79.

128. deBeer, *supra* note 125, at 147.

129. The Copyright Board gave the example of non-negligible use:

> [A] person who made two copies of sound recordings onto a type of medium in each of the last two years ordinarily uses that type of medium for private copying, even though that same person may well use many more such media for other purposes: a medium can have more than one ordinary use.

PRIVATE COPYING 1999–2000, COPYRIGHT BD. OF CANADA, at 30 (Dec. 17, 1999), http://www.cb-cda.gc.ca/decisions/c17121999-b.pdf.

130. Copyright Act, R.S.C. 1985, c. C-42, § 83.

131. *The Private Copying Tariff*, CANADIAN PRIVATE COPYING COLLECTIVE, http://www.cpcc.ca/en/the-cpcc/private-copying-tariff (last visited Mar. 5, 2015).

132. *Id.*

133. *Financial Highlights*, CANADIAN PRIVATE COPYING COLLECTIVE, http://www.cpcc.ca/en/wp-content/uploads/2015/07/Financial-Highlights-2014EN.pdf.

Canada's copying levy on blank media has one other distinct difference in that, unlike the AHRA where royalty payment shields users from infringement liability, the payment of taxes does not provide a defense.[134] This means that even where authors are compensated by levies on DARTs, individual infringers who use them may still be liable for infringement suits because the levy is only for noninfringing, private noncommercial use.[135]

V. Dusting off the AHRA

In today's digital age where cloud-based computing and digital media are the norm, the AHRA's compensation scheme must be redirected to target realistic sources. The Information Society Directive addressed the same concerns as the AHRA—technological development's diverse consequences for creation, production, and exploitation of creative works—but enabled a much wider pool from which a royalty could be collected.[136] Broadening the taxable bases under the AHRA would allow for fair compensation to copyright owners without restricting innovation because any additional cost would be passed on to the consumer. This can be done by doing what the E.U. has done—assume that digital technology will be used to its full potential by consumers. Any "fair compensation" through a royalty or levy scheme must take into account the degree of use of technological advances.[137] The variety of European implementations of the Directive can be an invaluable example to Congress as the need for overhauling the Copyright Act for the digital age becomes increasingly necessary. Unfortunately, the AHRA currently resembles the United Kingdom, which complete lacks compensation to artists for losses due to private copying, more than their Finnish neighbors.

Canada's Private Copying Tariff is also rooted in a growing need to compensate copyright owners due to losses in revenue brought on by digitalization and mass infringement. Canada's levy on technology that enables "non-negligible" music copying is vastly broader than the American AHRA, which only applies where media has a "primary purpose" of music copying.[138] The U.S. draws a distinction between a CD-R and CD-R Audio, while Canada does not, but given the dwindling use of

134. Armstrong, *supra* note 71.

135. *Id.*

136. "While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation." Information Society Directive, *supra* note 101, at 10.

137. *Id.* at 7.

138. deBeer, *supra* note 125, at 148.

the CD format itself, a "non-negligible" view of music media is a good route.[139]

Congress should amend the definition of DARDs and DARMs with the knowledge that, even if physical formats become totally obsolete, another format will take its place. Congress should draft an amendment that encapsulates copying-capable devices and media including computers and adopt a "non-negligible" standard for applying a royalty. The recent resurgence in the vinyl format is evidence that consumer preferences are unpredictable.[140] America is in desperate need for copyright reform and Congress would be well served to remember that "[u]ncertainty . . . is the only certainty there is."[141] Congress should also explore expansion of taxable consumer electronics to include hard drives and mp3 players, similar to the Finnish regime prior to the adoption of the new government fund, which pays compensation to artists directly. Perhaps Congress would be willing to even provide for artist compensation directly through a federal fund and bypass the headache of navigating specific technologies in the age of designed obsolescence and consumer product convergence.[142] This last suggestion, to mirror Finland and Spain, would allow for artist compensation that is both technologically neutral and future-proof and ensure that fair compensation is not at the mercy of the unpredictability of consumer technology and trends.

Alarmed by its dwindling effectiveness in carrying out its mandate, the AARC's new lawsuit opens up the possibility for renewed examination of the flaws within the AHRA's narrow construction which made (and continue to make) the Act unsuitable for fair compensation and protection for copyright owners. Though there is the potential for the District Court of Washington D.C. to make a departure from *RIAA v. Diamond*[143] in the current litigation, many think the issue is dead.[144] The AHRA, as it stands

139. Lisa Respers France, *Is the Death of the CD Looming?*, CNN (July 20, 2010, 4:40 PM), http://www.cnn.com/2010/SHOWBIZ/Music/07/19/cd.digital.sales/.

140. Smith, *supra* note 33.

141. Depoorter, *supra* note 19, at 1831 (quoting JOHN ALLEN PAULOS, A MATHEMATICIAN PLAYS THE STOCK MARKET, at v (2003)).

142. Convergence occurs when multiple products are merged into one, with the combined advantages and functionalities of all of them. *'Fair Compensation for Acts of Private Copying,'* EUROPEAN COMM'N, http://ec.europa.eu/internal_market/copyright/docs/levy_reform/background_en.pdf (last visited Oct. 25, 2015). This is one of the reasons why the AHRA's narrow focus on products with the "primary purpose" of copying is ill-suited to address technologies capable of copying. *Id.*

143. 180 F.3d 1072 (9th Cir. 1999).

144. Mike Masnick, *Recording Industry Willfully Misreads the Law in Order to Sue Ford & GM for Having Built-in CD Rippers*, TECHDIRT (July 29, 2014, 9:11 AM), http://www.techdirt.com/articles/20140728/17321728038/recording-industry-files-insane-lawsuit-against-ford-gm-having-built-in-cd-rippers.shtml.

today, does not effectively provide any sort of "fair compensation," but it does carry some utility by serving as a cautionary tale that a narrowly drafted statute is no match for a digital world.[145]

Now is the time for Congress to act. The AHRA's exceptions for CD-R and hard drives must be abolished to give copyright owners a realistic chance of fair compensation. Applying an "iPod tax" based on memory capacity, similar to Finland, or on all blank media, such as in Canada, are both better options than the current state of the AHRA in compensating artists for revenue losses brought on by the digitization of technology.

VI. Conclusion

After twenty-three years and one litigated case, copyright holders' ability to maximize their proper remuneration for creative works slips further into the digital space. The AHRA, in effect, came out squarely on the side of consumer device manufacturers and continues to snub its nose at the intended beneficiaries of the Copyright Act. If Congress intends to give the AHRA and the Copyright Act the teeth necessary to properly compensate rightsholders, Congress should look to the E.U.'s Information Society Directive, which explicitly acknowledged that "[a] rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that . . . cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers."[146]

The proposal that Congress amend and expand the AHRA would generate real revenue for artists, in line with the duty to enforce "fair compensation" while simultaneously preventing future technology-specific issues. The AARC's suit against car manufacturers demonstrates a desperate need for a fresh perspective that considers the realities of digital music consumption and technological advancement. The AHRA is outdated, forever stuck in 1992, when in-car home copying was never debated or considered. Copyright and technology are closely intertwined; technology is used to both create copyrightable works and to infringe on them. Europe and Canada are actively working to bolster their cost-shifting compensation schemes to protect artists in the digital age. Looking forward, Congress would do well to keep in mind the unpredictable direction of music trends and amend the AHRA to inject it with the deliberate vagueness necessary to encompass new technologies. Without it, the U.S. Copyright Office will be powerless to stop device manufacturers that profit from and enable small time infringement without

145. PARKS, *supra* note 54, at 175.

146. Information Society Directive, *supra* note 101, at 1.*

at least attempting to secure moderate compensation for authors and, in essence, letting the beast go untamed.

* * *